PP

v.

KHAIRUDDIN ISMAIL

HIGH COURT MALAYA, SHAH ALAM
ABANG ISKANDAR JC
[CRIMINAL TRIAL NO: 45-37-2003]
6 APRIL 2009

CRIMINAL LAW: *Dangerous Drugs Act 1952, s. 39B(1)(a) - Trafficking - Accused arrested while escaping from house where drugs were found - Whether accused had care and management of house - Failure of prosecution to prove accused had control and custody of drugs - Presumptive provisions of possession under s. 37(d) Dangerous Drugs Act 1952 - Whether could be invoked - Whether accused acquitted and discharged*

EVIDENCE: *Adverse inference - Evidence Act 1950, s. 114(g) - Failure to call material witnesses - Whether adverse inference to be taken against prosecution*

The accused was charged with an offence of trafficking in 28,241g cannabis under s. 39B(1)(a) Dangerous Drugs Act 1952 ('DDA') by the High Court. According to the prosecution's case, a police party, acting on information, arrested a suspect named Sukiman at a fruit stall in Banting on suspicion of being involved in drug trafficking. Sukiman led the party to a house where, he alleged, the person actually involved in drug trafficking at the fruit stall stayed. While waiting outside the house in ambush, the party arrested another man named Rizal as he was leaving the premises. As the party then moved in on the house they saw the accused at the front door inside the house locking the padlock to the front door grille and rushing in. The police party cut open the padlock and entered the house but when they got to the dining room they found the accused had escaped through a hole in the ceiling and was on the roof-top. After much persuasion he came down from the roof and was arrested. Near the hole at the ceiling three plastic bags were found each of which contained ten slabs of suspected cannabis. In the accused's trouser pocket the party found a bunch of keys, one of which opened the padlock at the front door grille. Among those who testified for the prosecution were the investigating officer (SP8) and a neighbour of the house (SP3). The issues that arose were (i) whether prosecution was

A able to prove the accused had *mens rea* possession of the drugs; (ii) whether accused had control or custody of drugs and (iii) whether s. 37(d) of the DDA 1952 could be invoked.

Held (acquitting and discharging the accused):

B **(1)** The house was accessible to many people as could be deduced from the evidence of SP3. The prosecution had not established who had been the tenant(s) of the house although the house owner had been traced by SP8. (para 31)

C **(2)** The house owner was not called as a witness to clarify the tenancy issue. Nor was Rizal or Sukiman called as witnesses nor their recorded statements produced to clarify matters relating to the house and its occupants. This failure invited adverse inference to be taken against the prosecution under
D s. 114(g) Evidence Act 1950. (paras 18 & 35)

(3) On the evidence it was unsafe to conclude either that the accused was a tenant in the house or that since he had with him the keys to the padlock and front grille door he must be
E presumed by s. 37(b) of the DDA to be the person having the care and management of the house. (paras 23, 24 & 34)

(4) It had not been established that only the accused had the keys to the house. SP8 found no personal belongings of the accused in the house and even suggested the house seemed
F to be occupied by more than one person. (paras 29 & 30)

(5) The prosecution's forensic expert on finger-printing testified to the absence of the accused's fingerprints on the seized items. (para 36)

G

(6) The accused was not shown to have had either control or custody of the drugs. As such, the presumptive provisions of possession under s. 37(d) of the DDA could not be invoked. (para 40)

H *[The prosecution has filed Notice of Appeal against the above decision.]*

Case(s) referred to:

Abdullah Zawawi Yusoff v. PP [1993] 4 CLJ 1 SC ***(refd)***

Chan Pean Leon v. PP [1956] 1 LNS 17 HC ***(refd)***

I *Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA* ***(refd)***

Namasiyiam Doraisamy v. PP & Other Cases [1987] 1 CLJ 540; [1987] CLJ (Rep) 241 SC ***(refd)***

Parlan Dadeh v. PP [2009] 1 CLJ 717 FC ***(refd)***

PP v. Jamali Adnan [1985] 1 CLJ 196; [1985] CLJ (Rep) 656 HC ***(refd)***
PP v. Kasmin Soeb [1974] 1 LNS 116 HC ***(refd)***
PP v. Mansor Md Rashid & Anor [1997] 1 CLJ 233 FC ***(refd)***
Sia Soon Suan v. PP [1965] 1 LNS 165 FC ***(refd)***
Tai Chai Keh v. PP [1948] 1 LNS 122 CA ***(refd)***
Toh Ah Loh & Mak Thim v. Rex [1948] 1 LNS 72 HC ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 180
Dangerous Drugs Act 1952, ss. 2, 37(b), (d), 39B(1)(a)
Evidence Act 1950, s. 114(g)

Other source(s) referred to:
Charles C Moore, *A Treatise on Facts or the Weight and Value of Evidence*, vol I, p 61

For the prosecution - Naziah Mokhtar DPP
For the accused - S Balasubramaniam

Reported by Ashok Kumar

JUDGMENT

Abang Iskandar JC:

[1] The accused ('the OKT') was charged before me with an offence of trafficking in dangerous drugs 'cannabis' under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA 1952'). The charge (P2) in its original language had read as follows:

> Bahawa kamu pada 20hb. September 2002, jam lebih kurang 11.00 pagi, di rumah No. 35, Jalan JU, Taman Mewah, Teluk Panglima Garang, di dalam daerah Kuala Langat, di dalam negeri Selangor Darul Ehsan, telah didapati memperedarkan dadah berbahaya sejumlah berat 28241 gram Cannabis dan oleh yang demikian, kamu telah melakukan suatu kesalahan di bawah seksyen 39B(1)(a) Akta Dadah Berbahaya 1952 dan boleh dihukum di bawah seksyen 39B(2) Akta yang sama.

[2] The learned deputy En Mohd Iskandar bin Ahmad had called altogether 11 witnesses, in his quest to prove the said charge against the OKT. Throughout these proceedings, the OKT was defended by learned counsel En S Bala Subramaniam. At the end of the case for the prosecution, I had, after considering the evidence adduced and the submissions forwarded ruled that the prosecution had failed to establish its case against the OKT and I had consequently ordered that he acquitted and discharged

forthwith without his defence being called. The prosecution had since filed a notice of appeal against my said order of acquittal. I now furnish and set out the reasons why the prosecution had so failed in proving a *prima facie* case against the OKT at the end of its case in respect of the said charge P2.

[3] In a charge for drug trafficking under s. 39B(1)(a) of the DDA 1952, the prosecution must prove three legal ingredients so essential to the charge and they are: (1) That the accused person was at the material time, in possession of an impugned drug; (2) That the said impugned drug was a dangerous drug as defined under the DDA 1952; and (3) That he was at the material time trafficking in the said dangerous drug.

[4] Before this court, just like any court in this country, could properly call for defence to be entered upon a charge the prosecution must have, at the end of its case, established a *prima facie* case against him. In order to arrive at that finding, the court must subject the prosecution's evidence to a maximum evaluation and then ask itself the critical question to this effect: "If I decide to call upon the accused to enter on his defence, and he elects to remain silent, am I prepared to convict him on the totality of the evidence contained in the prosecution's case?" If the answer to that question be in the negative, then the prosecution had failed to establish a *prima facie* case and as such, the accused must be acquitted. If however, the answer is in the affirmative, then and only then will the court be justified to call for the defence to be entered. (See the speech by learned Justice Gopal Sri Ram JCA (as he then was) in the case of *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734.

[5] Having so considered the evidence of Puan Wan Rahimah bte Wan Ahmad, the Government Chemist (SP2) who had been called to testify on the true nature of the dried plant materials, I was satisfied that the prosecution had succeeded in proving that the said dried plant materials found in 30 slabs wrapped in plastic materials contained inside three plastic bags which she had received from Chief Inspector Rahim ak Mihos (SP8), were indeed 'cannabis' as defined in s. 2 of the DDA, 1952.

[6] The prosecution also had succeeded in establishing that there was no break in the chain of exhibits concerned in this case because I was satisfied that the various witnesses who had handled these exhibits had positively identified them as the same exhibits which they had dealt with in the course of the

investigations into this case. These exhibits were properly marked with markings peculiar to their makers and I see no reason to doubt the veracity of the relevant witnesses in that regard.

[7] But, has the prosecution succeeded in establishing at a '*prima facie*' level, that the accused was in possession of the seized cannabis as required by the law under the circumstances of this case as presented through the evidence led by the witnesses called to the stand in this court?

[8] At this juncture perhaps it would be useful to recall that the kind of possession that incriminates under criminal law, is possession with *mens rea* or possession with the necessary guilty knowledge. Justice Thomson J (as he then was) had said, in the case of *Chan Pean Leon v. PP* [1956] 1 LNS 17 as follows:

> To establish "possession" for the purpose of criminal law two separate questions are involved. The first is whether the accused party was in possession of the article in question and the second, by reason of the application of the *maxim actus non facit reum nisi mens sit rea*, is whether he had knowledge of the nature of the thing possessed." The first kind of possession alluded to by the learned Justice Thomson in the *Chan Pean Leon*'s case *(supra)* was illustrated by Justice Taylor J in the case of *Leow Nghee Lim v. Regina* [1955] 1 LNS 53; [1956] 22 MLJ 28 at page 30 therein, as akin to a sheriff's agent, "A man in possession, who really has only custody" and whom Shakespeare would accurately label as a "bum bailiff". But for the purpose of attaching criminal liability the kind of possession must mean more than just that. The Federal Court in the case of *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457 had ruled, in a speech by learned Justice Gopal Sri Ram JCA (as he then was) as follows:
>
> [23] We accept these authorities as correctly stating the law. It follows that where the prosecution seek to prove trafficking by relying on s. 37(da), it must prove at the trial, all the ingredients of possession set out in the cases of *Toh Ah Loh and Mak Thim* and *Saad Ibrahim*.

[9] In the cited case of *Toh Ah Loh & Mak Thim v. Rex* [1948] 1 LNS 72 the then Singapore Court of Appeal had explained the meaning of possession when appearing in a statute as follows:

> Possession, in order to incriminate a person, must have the following characteristics. The possessor must know the nature of the thing possessed, must have in him a power of disposal over the thing, and lastly must be conscious of his possession of the

A thing. If these factors are absent, his possession can raise no presumption of *mens rea*, without which (except by statute) possession cannot be criminal. (per Gordon-Smith Ag CJ)

[10] It is clear therefore that all the factors as identified by the learned justices in the cases referred to above, must be proved by the prosecution in order to establish possession with the necessary *mens rea*, against an accused person. Merely having one of those elements is not enough to attach liability for possession. For instance, the fact that an accused person is proven to know the whereabout or existence of a contraband item without more, would not count for much. Indeed, it could even be treated as utterly innocuous and that nothing sinister should be read into it. An example of this can be seen in the case of *PP v. Kasmin Soeb* [1974] 1 LNS 116 where learned Justice Mohd Azmi J (as he then was) had observed as follows:

> As far as leading the police to the place of discovery was concerned, there were at least two distinct inferences that could be drawn in the absence of information given by the accused. Either the accused himself had hidden the stolen property there or he had come to know of its whereabouts through a third person. In a criminal case, the inference favourable to the accused should be drawn." In that *Kasmin*'s case *(supra)* the appeal by the prosecution against an order of acquittal was dismissed.

[11] In another case of *PP v. Jamali Adnan* [1985] 1 CLJ 196; [1985] CLJ (Rep) 656 learned Justice Shanker J (as he then was) after discussing in quite detail the true meaning of possession in law, had then come to the following conclusion:

> For myself I would hold that mere knowledge of the whereabouts of the offensive material cannot be equated to control. The mere fact that A knows where B has concealed firearms is not enough to import control. There has to be something more. That something to my mind is an element of dominion over the material. It must be shown at the very least therefore that the situation where the material is placed is such that the person who had knowledge of its whereabouts had also access of it and could at any opportune moment of his choice have obtained possession of it or the capacity to direct its disposal.

[12] The utility in those two cases, to my mind, lies in the fact that mere knowledge of the existence even of a contraband item would not, solely, be sufficient to ground a conviction for an offence that requires proof of more than just the existence of knowledge on the part of the accused person of the impugned

item. I had emphasized on this matter because the fate of this case had largely been decided on account of that same consideration having due regard to the circumstances prevailing as adduced through the testimony of the various witnesses called by the prosecution.

[13] Having briefly stated the attendant legal position regarding the matter of possession with the necessary *mens rea*, it would be opportune to now look at the evidence adduced in this case and see how the same had played out in the context of the applicable legal principles.

[14] Of course we should begin with the facts of the case that the prosecution had wanted to establish against the OKT in this case, can be gathered in the opening speech which had been introduced and duly marked in this court as P3. Briefly, it may be further surmised as follows: On 20 September 2002, based on information received, Chief Inspector Chia Aik Chin (SP4) had led a police party to a fruit stall at Jalan Seri Medan, Taman Perwira, Teluk Panglima Garang, Banting, Selangor with a view to arrest a person who, according to the informant, was distributing illicit drugs at the area. An arrest was indeed made on the suspect, but nothing incriminating was found on his person. But as a result of the subsequent interrogation on him by SP4, the suspect had led SP4 to a house at no. 35, Taman Mewah, Teluk Panglima Garang, where according to the suspect the man suspected of drug trafficking activities at the fruit stall was believed to be staying. The suspect, by the name of Sukiman was then whisked away to the police station for further investigations. SP4 and his men had stayed on at the place while observing the said house no. 35 from a distance of about 30 metres across a children's playground from inside their respective cars. After a while, SP4 saw a man coming out of the said house no. 35. He was seen walking towards a car that was parked outside the said house. SP4 instructed his men to arrest the said person and the said man was duly arrested. SP4 and his men then proceeded towards the gate of the said house. In so doing, SP4 said that he saw a figure of a man inside the house in the act of locking the padlock to the grille at the glass sliding doors to the house no. 35. It was also SP4's evidence that the same figure had darted back inside the house. This bit of the evidence was challenged by the defence in the course of the examination of SP4 before me. According to SP4, he and his men had run towards the said sliding door and upon finding the grille was padlocked, SP4 had then instructed

A one of his men to cut the padlock. In the meantime, SP4 said he heard a sound coming from inside the said house no. 35 that resembled the sound of something falling onto the floor of the house. When SP4 finally was able to enter the said house, he said he saw a pile of debris consisted of broken ceiling tiles strewn on
B the floor of the dining room inside the house. On looking up, SP4 said that he saw a gaping hole in the ceiling. Meanwhile from outside the said house SP4 said that he could hear his men's voice shouting to the effect there was a man walking on the rooftop of the said house. After much persuasion by the police
C party the man who was walking on the rooftop had finally agreed to come down from the rooftop. He was duly arrested and brought, together with the man who was arrested when seen approaching the car parked outside the said house, to see SP4 who by then was back inside the said house no. 34. The passport
D allegedly recovered from the man seen on the rooftop revealed his name to be Khairuddin bin Ismail and he was the OKT in this court. The man arrested when approaching the car was identified as Rizal. The OKT's person was searched by SP4 and according to SP4 he had found a bunch of keys in one of the trouser
E pockets worn by the OKT. Later, it was alleged that one of the said seized keys could be used to unlock the padlock to the grille at the sliding door at the front of the said house which had been cut on instructions of SP4. SP4 also testified that from the dining area, as he looked up the ceiling, he could see a plastic bag near
F to the said gaping hole there. SP4 then proceeded to climb up the ceiling through the said hole above the dining area according to SP4, he then had found three plastic bags and that each of these bags, upon further inspection by him, had contained a total of ten compact slabs of plant materials suspected to be cannabis
G wrapped up in plastic materials. The impugned drugs were seized by SP4 and brought down from the ceiling into the dining area.

Later, both the arrestees and the seized impugned drugs (30 slabs in total) were brought back to the Banting police station. After
H documentation of the particulars relating to the arrests, the seizure of the items and the markings on the seized items by SP4 were completed, SP4 had then handed over the same to the Investigating Officer of this case, Chief Inspector Rahim ak Mihos (SP8). Based on the above scenario and after due investigations,
I the OKT was charged with the present charge for drug trafficking. No similar charge was preferred against Rizal and Sukiman. Neither of them was called to testify in this case, nor were their recorded police statements tendered in evidence during this trial.

[15] Given the above scenario, the prosecution had submitted that the OKT had possession of the 30 slabs of cannabis found by SP4 on the ceiling above the dining area in the house no. 35 Taman Mewah during the material time as stipulated in the charge (P2). Apart from alluding to the evidence of SP4, reliance was placed on the evidence of one witness by the name of Puan Foziah bte Alwi (SP3) who at the material time had claimed to be a neighbour, who then was staying in the house no. 37 in the same Taman Mewah. She had testified that she had seen the OKT staying in the said house no. 35 about a year before the day of the incident on 20 September 2002. She also said that she used to see the OKT coming in and out of the said house before the day of the incident and that she had even talked to him once, when he was washing a car and while she was hanging her clothes to dry. She also said that she used to see a lot of people coming in and out of the said house. She also testified in this court that the tenant of the said house was a man who once told her that he was a fruit seller. In her own words when examined by the learned counsel, she had said at p. 51-52 of the notes of these proceedings, as follows:

> Pada hari kejadian itu juga, (20 September 2002) selain OKT ini yang tangannya bergari, saya nampak dua orang yang saya kenal pun ada masuk ke dalam rumah no. 35 itu. Saya kenal salah seorang daripada mereka sebagai penyewa rumah no. 35 itu. Saya pernah berbual dengan penyewa itu dan bertanya apakah pekerjaannya dan dia jawap, dia jual buah. Orangnya muda dan hitam manis, berumur dalam lingkungan 20-an. Pada hari itu (kejadian) saya tidak pasti sama ada dia digari tangannya. Yang seorang lagi itu, saya hanya cam mukanya sahaja.
>
> Sebelum kejadian, ramai orang keluar masuk ke rumah no. 35 itu. Saya tidak pasti ada penghuni tetap di dalam rumah no. 35 itu. Saya tidak nampak siapa yang buka pintu rumah itu untuk orang masuk.
>
> Penyewa yang kata dia jual buah itu sudah duduk di situ 1 tahun lebih sebelum hari kejadian.

[16] Later on, during re-examination by the learned deputy, SP3 had said thus:

> Adalah satu anggapan saya sahaja bahawa orang yang kata dia jual buah itu adalah penyewa rumah No. 35 itu, kerana saya lihat dia selalu keluar masuk rumah itu.

[17] Her conclusion that the OKT was the tenant in the said house no. 35 was based on the following assumption when asked by the learned deputy, at p. 48 of the notes of these proceedings:

> TPR: Kamu kata OKT yang telah menyewa di rumah no. 35 itu. Bagaimanakah kamu tahu hal ini?
>
> SP3: Dari rupa dia, macam orang Indonesia.

[18] Taking her evidence at face value, there would appear to be at least two 'identifiable' tenants in the house no.35 at the material time. One was the OKT whom she concluded was a tenant of the said house because of his looks that resembled an Indonesian look and another was the self-confessed fruit-seller whom she presumed to be the tenant to the said house because she used to see her coming in and out of the said house. This had come from the prosecution witness herself. No tenancy document was tendered to that effect and the owner of the said house was not called to clarify this issue although he was traced by the investigating officer (SP8) who had said as follows, at p. 136 of notes of these proceedings:

> Saya telah dapatkan nama pemilek rumah tersebut yang kemudian dikenali sebagai Ng Sah Keng.

[19] When asked by the learned deputy further on the matter, SP8 had said:

> Saya ada bertanyakan tuan punya rumah no. 35 Taman Mewah itu, dan dia ada beritahu saya yang dia tidak kenal dan tidak cam penghuni yang tinggal di rumah kepunyaannya di no. 35 Taman Mewah tersebut. Of course, on the high authority of *Subramaniam v. PP* [1956] 1 LNS 115 (PC) this was hearsay, if the prosecution had intended this Court to believe what the said house owner had told him, as the truth.

[20] In a situation where an accused person, not being the owner of the house where he was arrested, who else could be better to enlighten the court as to the status of that accused person *vis-à-vis* the house if not the owner of the house. That would be the best evidence on the matter and the court is entitled to the best evidence. In this case, the house owner was available but his evidence was not tendered in any legally admissible form by the prosecution. No reason was forwarded by the learned deputy as to why the house owner was not called to the stand. The next best evidence could have come from Rizal, the man who was arrested outside the house as he was seen walking towards a

car parked outside the house. Among the things which he could have told the court must surely have been whether the OKT was a tenant of the house no. 35. But he too was not called to testify, nor his police statement tendered *in lieu*. In the light of SP3's evidence in this court, Sukiman should have been called to testify, or at least have his police statement tendered in court. SP3 had referred to the fact that the tenant was a man who confessed to her to be a fruit-seller and who she had seen staying in the said house no. 35 for over a year until the police raid on 20 September 2002. According to Chief Inspector Chia (SP4) the information he received had referred to a fruit seller being the target and indeed he had arrested a fruit-seller and this fruit-seller had in turn given him information about a man at house no 35 who was trafficking in drugs. When the learned counsel cross-examined SP8 (the investigating officer), SP8 did not deny that the OKT did inform the recording officer that Sukiman (the fruitseller who was arrested by SP4) was staying in the house no. 35. This is what SP8 said in that regard:

P/B: Apakah langkah yang kamu ambil untuk memastikan kebenaran atau sebaliknya kenyataan yang dibuat oleh OKT Khairuddin kepada pegawai perakam mengenai hal Sukirman tersebut?

SP8: Saya ada buat siasatan di rumah no. 35 Taman Mewah tersebut dan saya tidak ada menjumpai apa-apa dokumen atau pakaian yang dimiliki oleh Sukirman itu.

[21] Neither did SP8 find anything belonging to the OKT in the said house. Indeed what SP8 had concluded was that from the clothings that he had found in the said house no. 35, there could be more than two people staying in the house. But what this court found was that SP8 was satisfied with the rather inconclusive answers that he obtained from Sukiman regarding his place of abode at the material time. His answer to question by the learned counsel was rather revealing in that regard, when he had said at p. 154 of the notes of these proceedings, thus: "Selain itu, saya telah bertanya kepada Sukirman mengenai di mana dia tinggal dan dia telah tidak dapat memberi alamat tempat tinggalnya dengan tepat. Dia tidak ada beri alamat No. 35 Taman Mewah sebagai alamat tempat tinggalnya. Itu sahaja yang saya telah lakukan berkenaan Sukirman ..." Given the role played by Sukiman in pointing out the said house no. 35 to SP4 as the trafficker's 'nest', it would be suicidal for Sukiman to volunteer information by saying that he had stayed at the same house no. 35. For SP8

A to expect Sukiman to offer such information to him that same address as his place of abode, must be viewed as being, naïve to say the least.

[22] When queried as to his conclusion as to the place of abode
B of the OKT, SP8 had said at p. 146 of the notes of proceedings as follows: "Siasatan saya terhadap Khairuddin menunjukkan dia tidak mempunyai alamat tempat tinggal yang tetap sebelum dia di tangkap. Tetapi, hasil siasatan saya juga menunjukkan OKT Khairuddin ini adalah penyewa rumah itu berdasarkan keterangan
C jiran dan pemilik rumah." In the light of the evidence of SP3 in this court and what the house owner had purportedly told SP3 (which must be hearsay), at the highest, the status of the OKT as a tenant in the said house, could only be described as highly doubtful.

D **[23]** Looking at the totality of the evidence adduced by the relevant prosecution witnesses on this matter, it was my finding that it would be unsafe to conclude at a *prima facie* level that the OKT was for all intents and purposes, a tenant in the said house
E no. 35.

[24] It was also submitted by learned deputy that since the OKT was caught with the keys which could open the padlock and the front grille door at the said house, therefore he must be presumed by operation of s. 37(b) of the DDA 1952 to be a person having
F the care and management of the said house. The evidence of SP3 had clearly shown that she used to see a lot of people coming in and out of the house. But she did not say that it was the OKT who had all the while who had opened the house door for them. It was interesting to note that when SP4 arrested Sukiman, he
G said that he did not find any 'barang salah' on his person. Did he find any house key from Sukiman? In view of the above evidence even if s. 37(b) of the DDA 1952 were invoked against the OKT, the circumstances appearing in the prosecution's own evidence would rebut such presumption. It was held by Justice Taylor J in
H the case of *Leow Nghee Lim (supra)* as assembled "(2) the presumptions against a person accused under the Dangerous Drugs Ordinance, do not necessarily require rebuttal by defence evidence. They may be rebutted by circumstances appearing in the prosecution evidence." Apart from SP3's evidence, SP8 had
I confirmed that he had not found any personal effects belonging to the OKT in the said house. Given the circumstances pertaining to

the accessibility into the house as could be deduced from SP3's evidence, it would be difficult to conclude that the OKT had control of the house although he had the keys to the house.

[25] SP3 had also testified that after the OKT was brought into the said house with his hands cuffed, she saw the fruit-seller coming into the said house with another man whose name she did not know, but whose face she could recognize. Who was the fruitseller? Was he Sukiman? No attempt was made by the prosecution to clarify this matter. It was so easy to put two and two together and to conclude therefrom that this fruit-seller must in all probabilities be Sukiman, the guy who had 'conveniently' after being arrested and interrogated by SP4, had pointed out to SP4, the house no. 35 to be a trafficker's den. At the lowest, Sukiman must know something material about the house. In this context, he had become a witness who was significant in the unfolding of the prosecution's story and must therefore be called to testify or least have his statement recorded by the police be tendered in this court *in lieu*, so as to avoid the operation of adverse inference against the prosecution's case.

[26] Even his 'conduct' could not unequivocally lead to the irresistible inference that he was in possession of the seized cannabis. Much reliance had been placed in the learned deputy's submissions regarding the conduct of the OKT prior to his arrest and the keys that were seized from his trousers' pocket.

[27] As regards the conduct of the OKT who was seen by SP4 and SP5 locking the padlock and then running inside the house and was later seen walking on the rooftop of the terrace houses at the said address, it was urged upon this court by the prosecution that such conduct was symptomatic of a guilty mind. Suffice to say that evidence of conduct is equivocal in the sense that it is capable of more than one interpretation. As an illustration, I would quote the case of *Abdullah Zawawi Yusoff v. PP* [1993] 4 CLJ 1 where the accused took to his heels upon announcement of the discovery of drugs in his house. Justice Edgar Joseph Jr FCJ refused the invitation by the prosecution respondent to regard such evidence of the appellant's conduct as being incriminatory against him and his lordship had said at p. 6 of the report as follows:

> This conduct of the appellant was consistent with his having known of the presence of the drugs in the box before their discovery, indicating thereby a sense of guilt.

> On the other hand, it was conduct equally consistent with the appellant having been in a state of pure panic, bearing in mind that it was only after Insp Mat Yusof announced the discovery of the drugs that the appellant took to his heels. An innocent man faced with the prospect of arrest on a capital charge might foolishly react in that way. It is true that the appellant himself denied running away but we agree with the judge that the appellant lied on this point, but this does not preclude us from drawing such inferences as may be justified from the evidence adduced by the prosecution. The Jamaican Privy Council case of *Deputy Public Prosecutor v. Brooks* [1974] 2 All ER 840, cited to us by the learned deputy public prosecutor, where the accused, who occupied the driver's seat of stationary van which contained more than 1000 Ibs of ganja, together with several others in the van, scrambled out and ran off, when police officers hurried towards the van, is, therefore, readily distinguishable.

[28] This case of *Abdullah Zawawi Yusoff (supra)* was commented upon by the Federal Court in the case of *Parlan Dadeh v. PP* [2009] 1 CLJ 717 (Rayuan Jenayah No: 05-31-06) and this is what the apex court had said:

> It is now appropriate to consider the rationale of the court in explaining the conduct of the accused in running away in *Abdullah Zawawi Yusoff v. PP* [1993] 4 CLJ 1 which formed the basis of the submission of the Appellant. In that case the drugs were found in a house occupied by the accused, his wife and a third person. The Court considered the evidence of possible access to the house by others, and in distinguishing the case from *DPP v. Brooks* [1974] 2 All ER 840, held that the conduct of the accused in running away was equally consistent with him having been in a state of pure panic even though he did not offer any explanation himself ...

[29] The evidence of SP3 (the neighbour) had been quite telling on this issue. She had said that 'ramai orang keluar masuk rumah no. 35 tersebut'. SP3 said that there were other people 'renting' the house, including a fruit-seller. Actually, during cross-examination of SP3 by learned counsel, she was not sure who the tenant of the said house was. She had said: "Sebelum kejadian, ramai orang keluar masuk ke rumah no. 35 itu. **Saya tidak pasti ada penghuni tetap di dalam rumah no. 35 itu. Saya tidak nampak siapa yang buka pintu rumah itu untuk orang masuk** ..." (emphasis added) And during re-examination by the learned deputy, SP3 had explained how she had come to her conclusions that the fruit-seller was a tenant in the said house and more telling was her basis for concluding as a matter of fact that

the OKT was a tenant, namely by virtue of his appearance which resembled an Indonesian. Her evidence was therefore not very credible in that regard and coupled with the non-calling of the alleged house-owner, I had found it rather perplexing at the conclusion that had been arrived at by SP8, namely that the OKT was the tenant of the said house. Prosecution did not produce the landlord to say that accused was his tenant. In fact, according to SP8 the landlord could not identify nor tell him who the tenant to his house was. Through his own investigations, SP8 also found as a fact that no personal belongings of the OKT were found in the said house to even suggest that he was a tenant in that house. On the other hand, SP8 had also made a finding that the clothes that he had found in the said house had suggested to him that there could be more than one occupant in it.

[30] Prosecution did not establish that only the accused had keys to the house. No evidence was led as to how many set of keys were given by the landlord or house owner to the tenant of the house or whether he himself had kept a set of keys to the said house. It was not establish that no keys were recovered from Sukiman. What was established by SP4 was that no illicit drugs were recovered from him. Bearing in mind SP3's evidence, this fact, to my mind had become rather significant. Bearing in mind too that the OKT was the only person left in the house after Rizal had left the said house, it would only be reasonable to find the OKT with the house keys under the circumstances.

[31] As such, in this case, a similar finding like the one in *Abdullah Zawawi Yusoff*'s case *(supra)* ought to be made in favour of the OKT because clearly the said house was accessible to so many other people as could be deduced from the evidence of SP3 and that it was not established by the prosecution as to who had been the tenant[s] of the said house although the house owner was traced by the investigating officer, SP8. The OKT could have knowledge of the existence of the drugs in the house and that could equally explain his conduct of running away which could be caused by a state of "pure panic even though he did not offer any explanation himself." In *Abdullah Zawawi Yusoff*'s case *(supra)*, it is worth recalling that the apex court had said:

> An innocent man faced with the prospect of arrest on a capital charge might foolishly react in that way. It is true that the appellant himself denied running away but we agree with the judge that the appellant lied on this point, but this does not preclude us

A from drawing such inferences as may be justified from the evidence adduced by the prosecution. (per Justice Edgar Joseph Jr.)

[32] Apart from that, from the evidence of SP3 as well, could it be said with confidence that she really had been referring to the B OKT as the same person whom she said had spoken to and whom she said she had seen coming in and out of the said house no. 35 for the past one (1) year before the day of the incident? I posed this question because of the existence of P25, namely the passport tendered by the prosecution bearing the name of the C OKT in it. SP8 had said from the passport, the OKT had come only a few days before arrest, though he did come in July as well but definitely not over a year prior to the day of the incident as could be seen in the endorsements made in P25 as indicative of the entry dates of its bearer into Malaysia. Clearly, there appeared D on the face of it, two contradicting evidence produced by the prosecution on a very material issue relating to the identity of the OKT if what P25 had indicated was compared with the evidence of SP3. Her positive identification of the OKT could very well be doubtful. E

[33] As such, with respect, I would not read too much into the fact that keys that could open the padlock of the grille door of the said house were found in the trousers pocket worn by the OKT. Taken in totality with other evidence led by the prosecution F witnesses itself, it would be stretching it too far to conclude that only the OKT had those keys to the said house. On the contrary, the fact that SP3 said that she had seen a lot of people coming in and out of the said house would invite the reasonable inference favourable to the OKT that there could be other people would G have keys to the said house as well. The time tested principle in the speech by learned Justice Spencer Wilkinson J in the case of *Tai Chai Keh v. PP* [1948] 1 LNS 122; [1948-49] MLJ Supp 105 still is good law. His lordship had said, at p. 108 therein:

H Where there is more than one inference which can reasonably be drawn from a set of facts in a criminal case, we are of the opinion that the inference most favourable to the accused should be adopted.

[34] As such, it would be unsafe to conclude that the OKT had I control over the said house such that the presumption under s. 37(b) of the DDA 1952 ought not to apply against him. In fact, a very serious doubt had already existed in the prosecution's case as regards whether the OKT was indeed a tenant there.

[35] Rizal and Sukirman were not called as witnesses in court nor their recorded statements produced. The role Sukiman was not just limited to showing SP4 the said house. It could be concluded that Sukiman knew that the said house was used by people trafficking drugs. The SP3 had said a fruit-seller also used to come to the house and that he had told her that he was a tenant in that house. Apparently, as can be easily recalled, Sukiman was the person who had, after being arrested and interrogated by SP4, initiated the police into going for the said house at no 35 Taman Mewah. Sukiman, to my mind, had fulfilled the role of the witness who in court would unfold the narrative of the prosecution's case, especially on the matters relating to the said house and its occupants. I would have not ruled as such, had the evidence for the prosecution been overwhelming, in which case, following in the footsteps of *Namasiyiam Doraisamy v. PP & Other Cases* [1987] 1 CLJ 540; [1987] CLJ (Rep) 241 (SC), Sukiman's evidence would not have been necessary. But in this case, to say the least, apart from Sukiman, the house owner ought to have been called to the stand as well. As such, the failure by the prosecution in this regard, to my mind, must invite the invocation of adverse inference against the prosecution under s. 114(g) of the Evidence Act 1950, which essentially states that the court may presume that evidence which could be and is not produced would if produced be unfavourable to the party who withholds it. In this case, no explanation was given by the learned deputy as to why the recorded statements of these two witnesses were not produced *in lieu* of their appearance in this court.

[36] Quite apart from that, the forensic expert on fingerprinting called by the prosecution had testified that the no decent fingerprints could be lifted from the exhibits which could usefully be analysed to determine its origin, let alone establishing the OKT's fingerprints on the seized items. The significance of fingerprint evidence must vary according to the circumstances in each case. As could be readily seen in the case of *PP v. Mansor Md Rashid & Anor* [1997] 1 CLJ 233 where the accused person was caught red-handed with the impugned drugs, such forensic evidence may well take a backseat, but in cases where the nexus between the accused person and the contraband items seized needed to be established in order to found possession with *mens rea*, such as in this case, the absence of the OKT's fingerprints on the seized items must necessarily be concluded as favouring the OKT, namely he had nothing to do with it. As such, the absence of positive evidence of fingerprint traceable to the OKT in this

A case had, to my mind further weaken the prosecution's case in terms of establishing the essential fact that the OKT had had control of the impugned drugs found on top of the ceiling.

[37] Having perused through the evidence thus far adduced in
B this case by the prosecution, I had found that at the highest, the accused might in all probabilities have knowledge of the cannabis in ceiling in the said house. However, mere knowledge as could be seen in the decided cases such as, *inter alia*, *Kasmin Soeb (supra)*, cannot in law incriminate against any person. As regards
C his conduct which the prosecution had perceived to be reflective of his guilty mind, an equally innocent inference could be arrived at in favour of the OKT, as had happened in the *Abdullah Zawawi Yusoff*'s case *(supra)* where the learned Justice Edgar Joseph FCJ had said, "An innocent man faced with the prospect of arrest on
D a capital charge might foolishly react in that way."

[38] It would be fair comment for one to say that there was a high degree of suspicion that the OKT might have possession of the cannabis so found, but that in itself would not be good
E enough to irresistibly conclude the OKT as having possession with the necessary *mens rea* of the impugned drugs. The legal burden to prove the guilt of the accused person lies with the prosecution throughout the trial. In the course of discharging that burden, suspicion or conjecture however strong and tantalizing it may be,
F is not equal to legal proof. It can never be so, for nothing short of proof would suffice. And rightly so, because though a suspicion may well lead to a plethora of possibilities, it nevertheless suffers from an inherent deficiency which is incurably fatal. Indeed, it had been said that it would be very tiring for any court to partake a
G journey, laced as it were, with suspicions rather than evidence. Charles C Moore, in his celebrated work entitled, "*A Treatise on Facts or the Weight and Value of Evidence*." vol. I, had given one of the more compelling descriptions regarding the true nature of the animal otherwise commonly known as 'suspicion', at p. 61 therein
H thus:

> [a] suspicion cannot give probative force to testimony which in itself is insufficient to establish or to justify an inference of particular fact and the sea of suspicion has no shore and the court that embarks upon it is without rudder or compass.

I

[39] As such, in any court of law, only evidence would count. I was ever reminded of what Justice Ong Hock Thye Ag CJ (Malaya) had said in the Federal Court case of *Sia Soon Suan v. PP* [1965] 1 LNS 165, as follows:

> ... the requirements of strict proof in a criminal case cannot be relaxed to bridge any material gap in the prosecution evidence. Irrespective of whether this court is otherwise convinced in its own mind of the guilt or innocence of an accused, its decision must be based on the evidence adduced and nothing else ...

[40] In this case before me, the evidence as adduced by the prosecution had fallen short of the required quantum of proof at the *prima facie* threshold placed on it under s. 180 of the Criminal Procedure Code in establishing possession, let alone trafficking, before this court could order for the OKT to be called to enter on his defence to answer to the charge as preferred against him. At the highest, the OKT could or might have knowledge of the existence of the impugned drugs in the house, but he had not been shown to have either control or custody of the same. As he did not have control or custody over the drugs, therefore he did not have what the learned Justice Shanker J (as he then was) had described, in the case of *Jamali Adnan*'s case *(supra)*, as dominion over the same, thus he did not have possession over the same. As there was neither custody nor control over the said drugs attributable to the OKT, the prosecution could not, under the circumstances, invoke in aid the presumptive provisions of possession under s. 37(d) of the DDA 1952. Such being the evidential state of affairs with regard to possession, the issue of trafficking therefore had become a non-starter as a direct consequence thereof.

[41] Premised on the above considerations, I had therefore acquitted and discharged the OKT forthwith.